IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MICHAEL SCALES, Appellant.	No. 37136-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Following a trial at which Christopher Michael Scales represented himself, a jury found Scales guilty of unlawful delivery of a controlled substance, RCW 69.50.401(2)(a). By special verdict, it also found that Scales committed the offense within 1,000 feet of a school zone. RCW 69.50.435. Based on Scales's offender score of 14, the trial court sentenced him to 84 months with an additional 24-month school zone enhancement for a total of 108 months confinement. RCW 9.94A.533(6). On appeal, Scales argues that the prosecutor's misconduct in eliciting questions about the credibility of the confidential informant and commenting on this credibility in closing argument entitles him to a new trial. In a statement of additional grounds (SAG),[1] Scales argues pro se that the charges against him should be dismissed

[1] RAP 10.10.

for violation of his timely trial rights under CrR 3.3. We affirm.

Facts

In the 2007 Operation Hard Rock, law enforcement conducted monitored controlled buys in the hilltop area of Tacoma using confidential informants. On April 24 of that year, Tacoma Police Officers Ryan Larsen and Quinn monitored confidential informant James Josey as he conducted a controlled buy of crack cocaine from Scales. At the corner of 21st and Martin Luther King Way, 311 feet from McCarver Elementary School, Josey made contact with a "middler"[2] who directed him to Scales. Josey's actions were video and audio recorded via hidden camera in the unmarked car that Josey drove. Although the hand-off of drugs occurred off camera, the audio portion of the recording revealed that Scales, the second man to enter the car that Josey drove, said, "Do you have a 20, I'll give you two more rocks." Josey replied, "No, I don't have any more money." The seller asked, "A five? A ten?" Josey replied, "No, I don't have any more money." 2 Report of Proceedings (RP) at 153.

The Pierce County prosecuting attorney charged Scales with unlawful delivery of a controlled substance on June 29, 2007. Trial was initially scheduled for September 4, 2007. On that date, the trial court granted the State's request for a continuance to obtain the presence of a witness who had moved out of state. That witness was never called to testify at Scales's trial.

Although he decided not to testify or call witnesses on his behalf, Scales represented himself at the October 31, 2007 trial. Scales cross-examined the witnesses presented against him

[2] Middlers are persons who connect would-be buyers with a particular seller. In this case, Josey made a sign that he wanted to buy drugs; the middler got into Josey's car and directed him to drive around the corner to where his supplier, later identified as Scales, was located. The middler got out of the car and Scales got in.

and twice moved to dismiss the charges. The first motion was made pretrial seeking dismissal for failing to produce the testimony of the confidential informant. The second was made post-trial but before the jury returned its verdict. In the second motion, Scales moved to dismiss for violation of his timely trial rights under CrR 3.3. When the State informed the trial court that the confidential informant would testify at Scales's trial, Scales withdrew the first motion and the trial court heard and denied Scales's CrR 3.3 motion.

The jury found Scales guilty as charged and he appeals.

Discussion

On appeal, Scales's counsel first argues that the prosecutor committed misconduct when he elicited testimony from Officer Larsen regarding the veracity or credibility of the confidential informant, Josey, and commented on that testimony during closing argument.

Initially we note that Scales did not object to Officer Larsen's testimony at trial and the appellant's opening brief does not contain a quote of the challenged testimony. Without citation to the record, the brief asserts, "[t]he deputy prosecutor asked Officer Larsen whether the confidential informant, upon whose testimony the case hinged, was reliable and credible, and Larsen replied that he was." Br. of Appellant at 7. A defendant may appeal a nonconstitutional issue only on the same grounds stated below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). The State responds that testimony regarding Larsen's relationship with Josey occurred during redirect as follows:

> Q Officer Larsen, had you ever worked with the informant that was utilized in this investigation on April 24th, 2007, before?
> A Yes.
> Q Have you ever had any difficulties with that informant's credibility or veracity?
> A No.

Q Have you ever had any difficulty with that informant failing to follow protocol or instructions?
A No.
Q To your knowledge, has that informant been used successfully in past investigations?
A Yes.

2 RP at 86.

Scales did not object.

More important, this testimony followed Scales's cross-examination of Officer Larsen:

Q Thank you. Are these so-called middlers, are they ever arrested for their active roles in their drug selling and buying?
A Yes.
Q What do you charge them with?
A Unlawful delivery of a controlled substance.
Q Okay. Are the informants that you use, are they ever tested for drug use?
A As in like a blood test?
Q UAs, blood test.
A No, they are not.
Q So they can tell you that they're clean, but they're not clean?
A Correct.
Q You just go on their word that they're clean?
A Correct.
Q On this day, April 24th, there was a middler also in and out of your informant's car. Was that middler identified?
A You know, I don't recall.

2 RP at 85-86.

On cross-examination, Scales sought to show that police were not properly monitoring Josey and took what he said at face value. He did not object to the State's eliciting testimony on redirect that contradicted that inference. Because Scales elicited testimony on cross-examination that, by taking drugs or being intoxicated, Josey may not have followed the protocol for controlled buys, the State was entitled to ask Officer Larsen about his history of dealings with Josey and his personal knowledge of whether Josey was intoxicated on the day in question.

Without objection, Scales's claim that the State committed misconduct by asking these questions of Larsen on redirect does not amount to reversible error. *See State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) (the defendant must show the conduct complained of was both improper and prejudicial; that is, there is a substantial likelihood that it affected the verdict).

Likewise, Scales's claim that the prosecutor's closing argument, which was not challenged at trial nor set out in the opening brief, does not entitle him to a new trial. In closing, the prosecutor argued:

> Ryan Larsen testified that while Mr. Josey has been used as an informant for quite a number of years and he's been used quite successfully with reliability and no problems, that if any informant were ever to be deceptive, misleading, and anything less than being forthcoming and candid with officers as a witness or informant for the State, they would be prosecuted.

2 RP at 146.

Again, we note that there was no objection to this argument. *See, e.g.*, *State v. Echevarria*, 71 Wn. App. 595, 597, 860 P.2d 420 (1993) (absent a proper objection, a request for a curative instruction, or a motion for mistrial, the issue of misconduct is waived unless it was so flagrant or ill-intentioned that the prejudice could not have been cured by an instruction). The trial court gave the standard introductory instruction emphasizing that the jurors are "the sole judges of the credibility of each witness . . . the sole judges of the value or weight to be given to the testimony of each witness." Clerk's Papers (CP) at 5. It also told the jury that counsel's arguments were not evidence. In addition, the prosecutor reminded the jury of these instructions at least twice. In context, the prosecutor's argument that Josey was a credible witness was primarily grounded in deductions from the unchallenged testimony presented in the case, it was not a statement of his personal belief and was neither flagrant nor ill-intentioned. *See State v.*

McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (distinguishing between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case).

Scales's appellate counsel acknowledges that such errors may be harmless in some cases, citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986), but asserts that this is not such a case. We disagree. Assuming for the sake of argument that the prosecutor's comments in closing argument were error, in light of the recording of the transaction and testimony that Josey bought crack cocaine from the second man, Scales, and not the middler, any such error was harmless.

The record established that on April 24, 2007, a confidential informant, Josey, met Tacoma Police Officers Larsen and Quinn at a prearranged location, where he was searched to make sure that he had no drugs or money on him. Officers then gave him money to use to purchase drugs. Josey drove a vehicle equipped with hidden audio and video surveillance equipment to 21st and Martin Luther King Way, 311 feet from McCarver Elementary School and within 1,000 feet of four school bus stops. Law enforcement officers monitored Josey at all times. After Josey made a hand sign indicating that he was looking to buy drugs, a man, the middler, got into Josey's specially-equipped vehicle and directed Josey to drive a short distance to meet the "middler's" drug supplier. Another person, later identified as Scales, got into the car and sold Josey $20 worth of rock cocaine. The seller got out of Josey's car and Josey drove to the prearranged meeting spot to rendevous with Quinn and Larsen. Josey gave the drugs he had purchased to the officers, he and the car were searched, and Josey wrote a statement concerning his purchase. At trial, Josey and the officers testified as set out above. In addition, and without

objection, the State admitted exhibit 4, a digital video disc-recordable (DVD-R) video/audio recording of the events.

Officer Daryl Higgins testified that he operated the hidden video equipment that recorded the events and monitored the transaction via this method. On cross-examination, Scales asked: "[Y]ou said I got into the person's car. Was there another person that got into the vehicle before?" 2 RP at 49. Higgins answered that there was. But Higgins had not identified Scales as the second man, he had only referred to the second man as the seller or dealer. Scales then asked, "But there was another person in contact with the informant prior to when --." 2 RP at 49. Higgins answered, "Yes, who went and got you and you came into the vehicle." 2 RP at 49.

The jury heard from Scales and Officer Higgins that he was the second man to enter Josey's car. Later Officer Larsen testified that, given the controlled buy protocol and the constant surveillance, Scales was the only one who could have given Josey the drugs. As a result, by the time the confidential informant positively identified Scales as the man from whom he had bought $20 of crack cocaine, Higgins had already identified him.[3] On recross, Scales suggested that

[3] Scales also argues that the prosecutor solicited improper opinion testimony of Scales's guilt when he elicited a hearsay identification of "Scales as the other person involved in the drug transaction" from Officer Larsen. Br. of Appellant at 7 (citing *State v. Demery* , 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). In order to determine whether statements constitute impermissible opinion testimony, we consider the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 759 (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994)). The record shows that Larsen testified that the seller was positively identified by another officer monitoring Josey's contacts:

> Q . . . The individual who sold the informant the controlled substances in this case, was that individual identified?
> A Yes, he was.
> Q Was that individual identified by an officer involved in the investigation who was on scene that day?
> A Yes.

Josey had bought the drugs from the "middler," but Josey testified that the only thing the middler had said was "drive around the corner, my guy is here." 2 RP at 114. Josey also testified, "I didn't give [the middler] anything, he was out of the vehicle after [Scales] got in." 2 RP at 114. The video was played for the jury. At one point, when the middler had left the car and only Josey and the seller remained inside, the recording contained the following: "Do you have a 20; I'll give you two more rocks." Josey replied, "No, I don't have any more money." The seller asked, "A five? A ten?" Josey replied, "No, I don't have any more money." 2 RP at 153. On the evidence presented, the errors complained of on appeal were harmless and do not warrant a new trial.

SAG Issues

As he did immediately after the State rested its case, Scales asks that the charges against him be dismissed for violation of the CrR 3.3 timely trial rule. Essentially, Scales claims that the State lied when it told the trial court on September 4, 2007, that it was requesting a continuance to contact a witness who had moved out of state. He contends that had the State been required to go to trial in a timely manner, he would have been acquitted because the crime lab report had not been completed. Scales asserts that the police officer witness who had moved out of state was not a material witness and that his proposed testimony was cumulative of that offered by the other four officers. He also argues that because the State did not provide the trial court with a

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Q To your knowledge, was that individual identified as the defendant?
A Yes.

2 RP at 75-76.

We agree with Scales that, standing alone, the prosecutor's questions were designed to elicit an inadmissible hearsay identification of the defendant and were improper. But because Scales did not object to the questions and, more importantly, because Officer Higgins had already identified Scales and Scales had already admitted during his questioning of Higgins to being the second man to enter Josey's car, the error was harmless. *See State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

subpoena, there was no basis on which the trial court could properly have continued the case.

Scales also argues that forensic scientist Tami Kee's trial testimony revealed she did not receive the drugs until August and that because the State was dilatory in handling the evidence, the charges against him should be dismissed. Scales apparently believes that a trial court lacked authority to grant a continuance to allow the State to obtain evidence to prove its case. He is mistaken. Under CrR 3.3(f), the trial court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense. *State v. Johnson*, 132 Wn. App. 400, 413, 132 P.3d 737 (2006), *review denied*, 159 Wn.2d 1006 (2007). No prejudice to Scales's ability to present a defense is established on this record. The trial judge denied Scales's dismissal motion noting that Kee did not testify that the State had waited until August to submit the drugs for testing, only that the "rock" she tested came into *her* possession in late August. Based on the prosecutor's representation that (1) Scales's former defense counsel was aware of the crime lab issue, (2) the lab had assured them that if the continuance motion were denied, it would complete the test in time to present the evidence at trial, and (3) he was "hoping to be able to transport a witness back from the East Coast," 3 RP at 176, the trial court properly denied Scales's motion to dismiss under CrR 3.3.[4]

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[4] Scales's motion to dismiss under CrR 3.3 was not timely.

> A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3). Because the basis of Scales's motion was an alleged misrepresentation to the trial court by the prosecutor, however, CrR 8.3(b) also is implicated. The trial court acknowledged as

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, P.J.

HUNT, J.

much when it ruled that in order to fully decide the motion, it would need to hear from Scales's former defense counsel regarding what she knew and when. Scales's statement that he learned of the lab report issues from his counsel at a subsequent continuance hearing suggests that she had been made aware of the issue with the crime lab.